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No. 89-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

CASES	Page
American Elec. Power Co., 46 S.E.C. 1299 (1978)	5
Appalachian Power Co. v. *FPC*, 328 F.2d 237 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964)	2, 3
Dole v. *United Steelworkers*, 58 U.S.L.W. 4200 (Feb. 21, 1990)	5
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 108 S.Ct. 2428 (1988)	2
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986)	2
Northwestern Elec. Co. v. *FPC*, 321 U.S. 119 (1944)	3
Puerto Rico Maritime Shipping Authority v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988)	4
STATUTES	
Federal Power Act, 16 U.S.C. § 825q	*passim*

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In their petition, fifteen small villages and towns in Ohio (petitioners) explained that the decision of the District of Columbia Circuit incorrectly limited and failed to pay deference to the Federal Energy Regulatory Commission's (FERC) authority to review transactions between affiliates of a registered public utility holding company under Section 318 of the Federal Power Act. 16 U.S.C. 825q. The Solicitor General filed a brief for the federal respondent that agreed with petitioners' contentions and urged the Court to grant the petition. Respondent Ohio Power now opposes the grant of certiorari

by attempting to rewrite both the decision of the court of appeals in this case and the decision of the Fourth Circuit in *Appalachian Power Co.* v. *FPC*, 328 F.2d 237 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964), which squarely conflicts with the holding below. Ohio Power also raises a few additional points that warrant a brief response.

1. Obviously recognizing that the field preemption holding of the court of appeals is both wrong as a proper interpretation of Section 318 and important as a matter of federal policy with respect to the proper regulation of the rates charged for electricity, Ohio Power argues (Opp. 7) that the decision below was actually based on a "conflict" in the requirements imposed by FERC and the Securities Exchange Commission (SEC). In evaluating this argument, it is helpful to remember the exact language of the court of appeals: "We cannot accept [the FERC's] rationale . . . because it proceeds from a false premise that the bar of section 318 applies only when there is a present conflict between SEC and FERC prescriptions." Pet. App. 14a. In the face of that clear holding, it is frankly incredible for Ohio Power to maintain that the issue of field preemption is not actually presented by the decision below.

Nothing in the opinion supports Ohio Power's assertion (Opp. 7, 10, 13-14) that the discussion by the majority of "trapped costs" amounted to a holding that the FERC's decision "conflicts" with SEC regulations. Contrary to Ohio Power's argument, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S.Ct. 2428 (1988), did not involve conflicts analysis. They were preemption of the field cases involving the filed rate doctrine. The discussion of trapped costs merely demonstrated how the state's nominally retail rate regulation in fact invaded the area of federal ratemaking which is the exclusive preserve of the FERC. Thus, aside from the complete irrelevance of those preemption

cases to a proper analysis of Section 318 (see Pet. 16), their use by the court of appeals in no way indicates that the decision below was based on an actual regulatory conflict.

The Solicitor General accurately described the status of the conflict issue as follows:

> Because the court of appeals did not reach the issue of whether in fact the SEC and FERC orders imposed conflicting requirements in this case, that issue would be open on remand.

SG Br. 13 n.6. In sum, the holding of the court of appeals is that under Section 318 the SEC's jurisdiction preempts the FERC's regulatory authority even without conflicting requirements. By not defending that holding, Ohio Power essentially concedes that the issue is worthy of review by this Court.

2. With respect to *Appalachian Power*, Ohio Power again engages in a revisionist interpretation of the holding of the court. While it may be, as Ohio Power contends, that the Fourth Circuit could have employed some other rationale for upholding the FERC's authority in that case, that fact does not change the court's holding that Section 318 did not apply because the SEC's jurisdiction is only preeminent when there are "actual conflicts." Again, it is appropriate to consider Ohio Power's claim in the context of the actual holding of the Fourth Circuit. "Under Section 318 of the Federal Power Act, actual conflicts between the FPC and the SEC are resolved in favor of the SEC," 328 F.2d at 250, but in that case, "the effort to discover an incompatibility between the two governmental agencies must fail." *Id.* at 252.

Nor is it a proper basis for denying certiorari that the issue has not arisen all that often. In light of the clear holding of *Appalachian Power* and the equally clear indications in *Northwestern Elec. Co.* v. *FPC*, 321 U.S. 119 (1944), that field preemption is not appropriate under Section 318, it is not surprising that the issue has

not arisen previously. But there can be little doubt that the new path charted for Ohio Power by the court of appeals will become well worn if the decision below is allowed to stand. While Ohio Power is willing to cast this consideration aside as mere hyperbole, a more neutral observer, the Solicitor General, found that "[p]etitioners reasonably catalogue the potentially far-reaching consequences of a decision that could hinder effective regulation of utilities. . . ." S.G. Br. 14.[1]

3. The court of appeals expressly held that FERC was not entitled to judicial deference in its interpretation of Section 318, which is a jurisdictional statute. Ohio Power contends (Opp. 16-18) that this holding does not conflict with decisions of other courts of appeals.

It is true that the holding can be narrowed to the issue of whether deference is owed to an agency's interpretation of a jurisdictional provision within the agency's organic statute that also implicates the regulatory authority of a second federal agency. But even on that issue, the decision here is in conflict with the approach of the Third Circuit in *Puerto Rico Maritime Shipping Authority* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988), which involved the regulatory authority of two agencies. See Opp. 17 n.13. What is more important, however, is that the holding also poses the more basic question of whether deference is ever owed to an agency's interpretation of a jurisdictional provision. As

[1] It is no basis for denying certiorari that the policy concerns implicated by the decision of the court of appeals could properly be presented to Congress or that Congress has occasionally considered abolishing PUHCA. Opp. 15. Petitioners in fact presented this issue to precisely the correct forum—the FERC—which is empowered to administer the Federal Power Act. FERC correctly held that Ohio Power's rates were unreasonable because of the rates charged for affiliate transactions. To the extent that "[j]udicial intervention is particularly inappropriate" (Opp. 15), it is not with respect to action by this Court to reinstate FERC's decision; instead, it was the intervention of the D.C. Circuit in setting aside FERC's rate determination.

we explained in the petition (Pet. 9-14), that issue is clearly one that warrants a decision by this Court. See also *Dole* v. *United Steelworkers*, 58 U.S.L.W. 4200, 4207-4208 (Feb. 21, 1990) (White, J., dissenting). And respondent does not dispute that claim.

4. Ohio Power also disagrees with the observation of Judge Mikva, the Solicitor General and petitioners that the decision below creates an erroneous regulatory gap in the setting of electric utility rates. Yet, Ohio Power admits that "[t]he SEC *never* regulates rates for the sale of electricity" (Opp. 10). Nor does Ohio Power dispute the SEC's own holding that it has "no power" over the dealings of electric utilities "with their customers, retail or wholesale", which are regulated under PUHCA. *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978).[2] See also Pet. 19. Nor does it dispute that the SEC, unlike FERC, has no customer complaint procedures and no express authority to order refunds for overcharges. See *id.* Accordingly, there can be no serious question that the court of appeals' decision leaves substantial gaps in the federal regulatory system, gaps that were not and could not have been intended by Congress.

[2] This is the complete answer to Ohio Power's repeated attempts to suggest, without really saying so, that the SEC in this case actually *required* Ohio Power to pass the coal costs at issue here onto its customers. See Opp. 2, 4, 5-6, 9, 11. The SEC never imposed any such requirement, and Ohio Power cites no evidence that it did.

Ohio Power also makes repeated references to SEC approvals of its "transactions." Opp. 2, 4, 5-6, 9. It is worth noting that the SEC never reviewed and approved any specific price for any coal sold by Southern Ohio Coal Company to Ohio Power. It approved general transactions with a requirement that all coal be sold "at cost" which includes both actual cost and a return on investment. Moreover, actual costs include salaries that can be bloated and other items which may be extravagant. Pet. 3-4. Thus, by approving a general transaction that contains a "cost" provision, the SEC in no way imposes any requirement on the price of coal that is in conflict with the FERC's order rejecting Ohio Power's rates.

5. Finally, Ohio Power, relying upon the administrative law judge's findings, which were set aside by the FERC, attempts to persuade the Court that its transactions with the Southern Ohio Coal Company actually served the public interest. Opp. 5, 15.[3] While not crucial to the worthiness of the questions presented for review, the claim is incredible in light of the uncontested findings that Ohio Power passed on prices for coal in the rates charged to petitioners that were between 24 and 94 percent above market price and that justified to refunds of approximately $10 million to wholesale customers. Thus, under the FERC's findings, the transactions at issue served only Ohio Power's interests and not the public good.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] Ohio Power's reliance (Opp. 5) upon findings of the ALJ based upon evidence that the mines were operated "efficiently" is misleading. That evidence was not contested by petitioners before the ALJ because under the FERC's market-price test such proof is irrelevant. Pet. App. 43a-44a, 71a. The market price standard is an objective one that does not permit the utility to justify above market prices on the basis of factors such as efficiency. *Id.* Thus, the findings of the ALJ in no way detract from the clear holding of FERC that the coal prices in Ohio Power's rates paid by petitioners were excessive.